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THE INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY

Project on Social Control and Human Rights

Research Paper (Final Draft)

INCARCERATION, SOCIAL CONTROL AND HUMAN RIGHTS

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1. Imprisonment, and related forms of confinement, has an extended and important role in modernity, arguably both longer and deeper than has sometimes been assumed. With significant cultural and contextual variations, it is perhaps not too much to say that confinement is the most global of modes of state punishment today. It has, seemingly, become a universal¹.
2. We know a great deal more in 2009 about the circumstances in which some 10 million people (Walmsley, 2009) are incarcerated by the world's criminal justice systems than was known even quite recently. Imprisonment as a world-historical phenomenon is becoming available for discussion, analysis and, arguably, intervention, in new ways (see e.g. Stern, 1998; Weiss and South, 1998). Such knowledge has not however in general been easily come by. As places of sequestration prisons have historically often been secretive and notoriously hard to access and this remains the case in many parts of the world.
3. However it might equally be argued that the very prevalence and, so to speak, obviousness of imprisonment as a predominant institution of punishment and control can serve to inhibit

¹ There are many modes of incarceration and confinement, and many institutions with prison-like characteristics. Some of these, such as contemporary institutions for the detention of immigrants and asylum-seekers, are addressed elsewhere in this volume. The focus in this essay is on imprisonment in criminal justice – the prison as a place of punishment for crime or remand pending trial. Ideally one would also wish to discuss, for example, concentration and prisoner of war camps, internment under emergency powers, renditions, the war on terror, Guantanamo Bay, not to mention asylums, secure hospitals, and so on. It is of course important to consider such matters as the transfer of populations between such institutions. As O'Sullivan and O'Donnell (2007) have recently shown for Ireland, for example, if one takes account of other forms of confinement such as orphanages and extended compulsory detention in mental institutions then the proportion of the population that has historically experienced some form of carceral confinement is very markedly higher than if one 'counts' only prisoners as such (and may indeed have declined significantly in the recent past in some countries). This is an important methodological precaution when comparing prison populations (different countries report their populations in very different ways, and the question of which is more 'punitive' or more severe is thus vastly more complex than commonly supposed. It also bears upon major theoretical issues such as those raised by the well-known 'dispersal of discipline' thesis associated with the work of Foucault (1979). For present purposes the need to retain some degree of specificity in a relatively short essay mandates a focus on imprisonment in its classic or 'common-sense' understanding.

analysis and debate. *Of course*, one is tempted to say, prisons are oriented towards control – this is plainly intrinsic to their character and construction. As well as *depriving* inmates of certain key aspects their liberty prisons *impose* certain definite conditions and requirements upon them. They confine, constrain, conceal and compel. Prisons often also institute certain quite particular regimes of compliance in the interests of *correcting* undesired conduct. In all these respects prisons are not just involved in social control through the application of the powers of the State they are constitutive of these. Thus to speak of incarceration as implicated in, or in relation to, social control, is to state the obvious.

4. In somewhat similar vein it seems all too apparent that prisons pose questions of human rights in often flagrant and acute ways. As Gresham Sykes pointed out half a century ago, introducing his classic discussion of ‘captive society’, prison officials ‘hold a grant of power without equal in contemporary society’. They:

...have the right not only to issue and administer the orders and regulations which are to guide the life of the prisoner, but also the right to detain, try and punish any individual accused of disobedience – a merging of legislative, executive and judicial functions that has long been recognized as the earmark of complete domination.

(Sykes, 1958: 41)

5. To incarcerate a person is thus not merely to restrict their freedom of movement but characteristically also to subject them to minute regulation and surveillance and to place them in a position of dependency. In this regard, even absent outright brutality or violence (widespread as these have been throughout the history of imprisonment), prisons raise problems and controversies concerning such matters as access to legal representation, the nature of grievance mechanisms and disciplinary processes, contact with families and friends, correspondence, religious observance, personal safety, health provision, nutrition, work and remuneration, discrimination with respect to race, ethnicity and gender, release and resettlement and so on. In short they touch just about every Article of every significant human rights instrument. No attempt is made here to summarize the increasingly vast body of law on these issues (see rather Livingstone et al., 2003; Livingstone, 2000; van Zyl Smit and Snacken, 2009).
6. Here again the practicality and urgency of these questions can serve to restrict our analytical perspective upon them. In homing in on issues of procedural justice or individual redress it is possible to overlook the larger questions about prisoners’ rights as clues to social organization and political culture. The extension, and sometimes retrenchment, of the recognition of prisoners as bearers of rights – in differing degrees, at different moments, in diverse jurisdictions – is an historically revealing and by no means straightforward story. It suggests a way of grasping varying social representations of crime and criminals and the ways of responding to their offending that seem to follow as appropriate from within the dominant sensibilities of time and place. Whether we view offenders as wayward members of a moral community, or as damaged but corrigible individuals, or as permanent carriers of unacceptable risks, or as despised outcasts, are dimensions of political culture that radically affect not just the regimes, conditions and handling that people undergo once incarcerated but also how many people we deem it acceptable to imprison and for what purposes in the first place. On this view social control and human rights are inherently and intimately connected issues and the prison is one of the institutions in which their connectedness is most pointed and significant. It is a key objective of this essay to make more explicit the connections between historical and geographical variations in modes of social control, the consequences of these for the changing uses of imprisonment, and the bearing of these on questions of human rights.
7. Murphy and Whitty (2007) have recently remarked on the existence of a curious disciplinary divergence in which social studies of contemporary prisons by criminologists and other social scientists make scant reference (or none at all) to human rights, notwithstanding their increasing

salience in the vocabulary of prison administration and their role in restructuring prison governance. Conversely, they argue, lawyers (meaning academics as well as practitioners) whilst steeped in the theory and applications of human rights have mainly failed to register the significance in the prison context of notions such as risk management, and so have overlooked the consequences of such shifts in discourse and practice for the regulation of prison life. The former omission, Murphy and Whitty argue (2007: 800) might result from some combination of disciplinary closure and over-dependence by researchers on officially-defined pragmatic and managerial considerations. The irony here is that the social scientists, in failing to engage with legal scholarship, may miss key aspects of what is going on:

Taken together, these factors do go some way towards explaining why [British] criminologists have not engaged with human rights. That said, it remains hard to understand why the 1990s criminological turn towards the rise in *punishment* (policies) did not prompt a companion interest in the growth of *rights*-based legal constitutionalism in the United Kingdom or, more specifically, the impact of the European Court of Human Rights on UK law in relation to matters such as prisoner release dates, disciplinary hearings or prisoner access to legal advice and the courts. (loc. cit.)

8. Conversely, Murphy and Whitty suggest, whilst there has been some development in doctrinal and substantive discussion amongst lawyers of human rights, with respect to prisons as in other fields, there is still “very little empirical literature within law on the impact of human rights [in the United Kingdom], in terms of both the initiation of rights claims and the implementation of rights norms” (2007: 801). They continue:

To put it bluntly, the general shift towards rights-based constitutionalism in the United Kingdom, and the specific impact of human rights law on both prisoner rights-consciousness and prison governance, needs to be recognized in prison-focused criminology (loc. cit.)

9. These seem strong arguments for mutual learning. In similar vein, but on a somewhat broader (European) canvas, van Zyl Smit and Snacken (2009) advert in the sub-title of their book to a concern to connect ‘Penology and Human Rights’. They argue that the “growing recognition of the human rights of prisoners in Europe, including the principle of the use of imprisonment as a last resort” is in part attributable to empirical research on the characteristics of prisons as institutions, and the effects of imprisonment, as well as to wider reflections on theories of punishment and the aims of imprisonment (2009: xvii).
10. In the main, however, such arguments still have their primary application to the interior aspects of prisons (the material conditions of life there, the role of rights discourses in shaping prisoners’ experiences and entitlements, the avenues for redress that may exist in case of grievance, the nature of prison discipline and control mechanisms) rather than extending to encompass their wider relation to questions of social control or contests over the scale and uses of imprisonment and its ‘alternatives’. They also, notoriously, have regard overwhelmingly to conditions in prisons in the global North, the historic exporters both of penological practices and of criminological analysis, not to mention of the dominant forms of human rights discourses themselves.
11. We propose therefore to begin with these wider, contextual questions. What roles have prisons played in social control in modern societies? To what extent have these changed in recent times? To the extent that prison populations have grown in some countries is this indicative of more profound shifts in their political culture – if so of what kinds, and with what consequences for human rights? How far are such changes attributable to seemingly new phenomena such as the varieties of economic, cultural and political change summarized under the notion of ‘globalization’, or to factors such as the much-vaunted ‘rise of risk’ (Garland, 2003)? Moving gradually back towards the level of institutional practice: what are the implications of the advent (or, some would say, the re-emergence) of privatization in the penal realm? What does any of

the foregoing tell us about matters such as order-maintenance and social control *within* contemporary prisons? How far are these aspects of penal practice conditioned by an acknowledgement of the prisoner as bearer of certain inherent, if in many instances residual, human rights – or, conversely, as was historically the more usual case, as one stripped of most of the entitlements and expectations of citizenship? Finally, what are the relations between imprisonment and other possible modes of sanctioning or crime-handling? What are the human rights implications of some of these?

12. This is a large agenda and no part of it can be addressed here in more than summary form. For us, however, a connecting thread in this diverse discussion is provided by the concept of legitimacy. This has several dimensions. In the first place the successful exercise of social control commonly depends upon some degree of acknowledgement of the authority and capacity of institutions and their agents (Beetham, 1991). Such concerns constrain as well as empowering office-holders – considerations of legitimacy require certain kinds of conduct and prohibit others. This can have diverse and unpredictable if not outrightly contradictory consequences in respect of punishment. Punishments such as imprisonment may be administered behind closed doors and in relative secrecy but the act of punishing takes place, as Garland (1990) explicates, before audiences. In this regard the legitimization-claims recognized by mass market newspapers or activated in political campaigns can on occasion stand in open conflict with those demanded by international human rights standards, let alone the responses of prisoners and other recipients themselves.
13. In the exercise of penal power as such, in prisons or in relation to ‘community’ penalties, legitimacy is notoriously hard to sustain – not least because such power is imposed involuntarily and by compulsion. Nevertheless, even minimal forms of compliance, of the kind necessary to keep the institution ticking over without scandalous levels of resistance and non-cooperation, appear under many circumstances to be quite strongly conditional on some minimal level of performance on the part of officials, as we will later show. The more human rights standards become part of the architecture of governance in prisons or other areas of penal systems, and especially the more they become part of the general vocabulary of people in their encounters with these institutions, the more the legitimacy of their operations is likely to depend on their conformity with those standards and principles, if only because they are laid open to new kinds of external challenge and objection.

INCARCERATION AND ERAS OF SOCIAL CONTROL

14. Throughout its modern history the prison has been dogged by ambivalence, alternately the subject of evangelical enthusiasms and nightmare visions, now claiming to correct, train, improve and rehabilitate, now to exclude, remove, deter, banish or bury. Imprisonment may have been, repeatedly, the subject of programmatic reforms yet it has never been pure or simple. Its dominance (or at least its global reach) owes much to the multiplicity of its rationales and uses, classically as both *punishment* and *control*.
15. Neither prisons themselves nor punishment in general are always and everywhere matters of the greatest controversy. Sometimes they ‘fly under the radar’ of express political attention for years at a time. It can be argued that the tendency to professionalize prisons and other penal processes, to delegate them to specialists, and keep them out of sight is part and parcel of what is (or perhaps was) *modern* about ‘penological modernism’ (Garland, 1990: 183). There are also less savoury reasons why some people sometimes have interests in keeping what goes on in prisons out of sight and mind – when prisons are secret and separate places it is much easier to impose control by force and threat, and to ignore prisoners’ pleas and complaints. We address one or two examples of this below.

16. Yet what we want prisons to do, to whom, and how are not subjects that ever entirely cease to have political energy, or wholly lose the capacity to arouse controversy (see further Sparks, 2003, 2007). From time to time, episodically, these issues return to the foreground of political attention and debate. Prisons can be scandalous, so to speak, in both directions. They arouse ire and indignation when they are deemed to depart from widely held societal expectations whether in the direction of indulgence (a frequently recurring complaint of some pedigree, as we shall shortly see) or, perhaps more rarely but not inconsequentially, of undue severity or cruelty.
17. If prisoners appear to receive levels of material comfort that are not universally available to more deserving people outside this can become sharply controversial; and this has been the case more or less persistently since the inception of incarceration in its modern forms. The so-called 'principle of less eligibility' has mandated that prisoners' conditions of life should not be preferable to those of the law-abiding poor throughout this time. Underpinning this 'principle' is a rough and ready, but often powerfully and deeply felt, sense of justice: the less deserving should not have the better things; no one should profit by their wrongdoings. There is also, and perhaps even more influentially, an abiding commitment on the part of many citizens, sentencers and political actors to the theory of deterrence: prisons need to be aversive in order to motivate compliance. Their regimes must therefore be pegged to, and must never exceed, the standards prevailing amongst the relevant stratum of the free population. The concern that prisons might 'not be sufficiently dreaded' (Forsyth, 1987: 145) has sprung up amongst respectable opinion on many occasions and in many places throughout the modern history of the institution. Transportation from Britain to Australia similarly suffered at times, even amidst instances of shocking brutality, from this anxiety. One of us has argued elsewhere that the resurgence in the 1990s in the United Kingdom of the view that prisons should be 'decent but austere' (or in the United States that prisons should maintain a 'no-frills' approach) is a latter-day re-invocation of this robust view (Sparks, 1996). Consider the following recent example:

Cons TV Enough to Make You Sick

It's cheaper than hospital.

Fury erupted last night as it emerged prisoners can watch TV in their cells for £1 A WEEK – but NHS patients have to pay £3.50 A DAY. Some jails, such as Saughton in Edinburgh, even offer satellite TV packages, including live football... MSP Michael Matheson stormed: 'It is simply outrageous that patients pay so much more than cons.' (*Scottish Sun*, 20 March 2006: 1)

18. Yet prisons can also be scandalous when they fail to provide safe custody or behave in ways that are arbitrary, invasive or gratuitously cruel. In Britain in the 1990s a practice of requiring female prisoners to give birth while handcuffed to their hospital bed was roundly condemned on all sides, most vigorously of all by a predominantly conservative newspaper *The Daily Mail*. Conversely, however, in very poor or very unequal societies where many people live in severe poverty the living conditions of prisoners are inevitably basic and arousing much interest in, let alone sympathy for, their circumstances can prove a daunting challenge.
19. How are we to explain these fluctuations and ambivalences? How, even more pressingly, can we explain the very great variations that occur in societies' reliance upon incarceration, both over time and between contemporary examples?

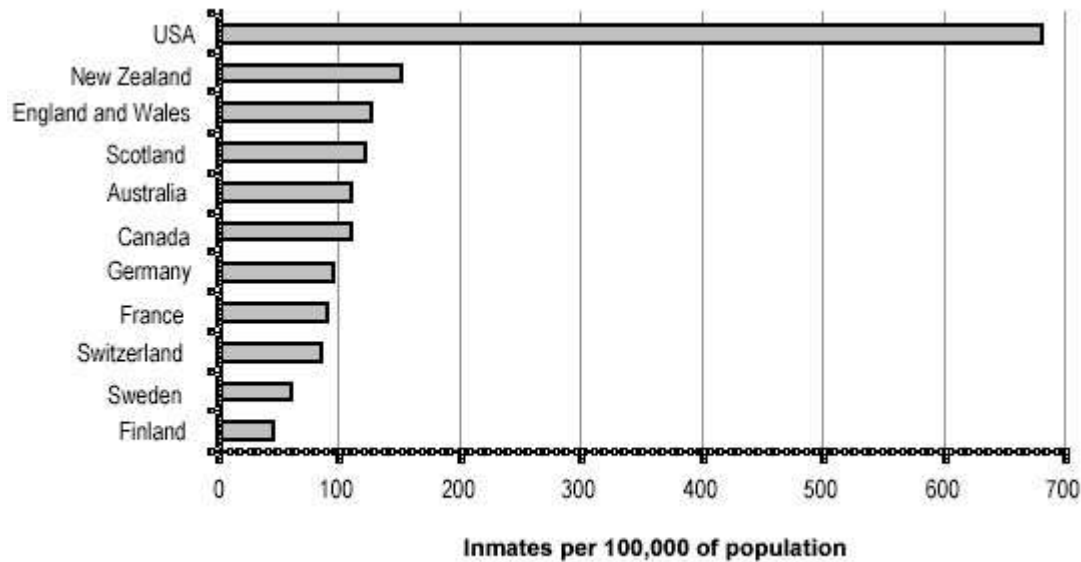
20. Throughout much of their modern history prisons have in theory been dedicated not simply to detention and punishment but to certain visions of coerced *inclusion*. However harsh their modes of operation may now appear the early penitentiaries (first in the United States, latterly in Europe) dedicated themselves to re-fitting their inmates for a responsible, God-fearing, self-governing, law-abiding life. The penitentiary, according to Melossi, 'was intended to be the entrance into a social contract that one had voluntarily or involuntarily ignored, but for which one was deemed to be at least potentially fit' (2008: 96). Some contemporary statements set their aspirations even higher. Thus the inspectors of the Eastern State Penitentiary in Philadelphia around 1830 regarded their institution as 'The beautiful gate of the Temple', through which the inmate might pass 'by a peaceful end to Heaven' (cited in Sykes, 1958: 132). Yet Charles Dickens, on visiting this same institution in 1842 describes its regime of solitude as 'rigid, strict and hopeless': "In its intention I am well convinced that it is kind, humane and meant for reformation" but in reality it "wears the mind into a moribund state, which renders it unfit for the rough contact and busy action of the world" (Dickens, 1842, pp.111 & 121). Dickens asserts:

I believe that very few men are capable of estimating the immense amount of torture and agony that this dreadful punishment, prolonged for years, inflicts upon the sufferers...I hold this slow and daily tampering with the mysteries of the brain to be immeasurably worse than any torture of the body...Those who have undergone this punishment must pass into society again morally unhealthy and diseased (ibid).

21. The prison was intended at one and the same time to evoke horror - to be a place of 'discipline and misery', as Benjamin Rush, one of its leading proponents, put it in 1787 - *and* "to change the moral character of man to such a degree 'as shall raise him to a resemblance of angels; nay, more, to the likeness of GOD himself' (Colvin, 2000: 52)" (Scharff-Smith, 2004: 204).
22. From its origins, therefore, the modern prison has encapsulated tensions between inclusion and repudiation, spiritual aspiration and waste-disposal (Simon, 1993), personal transformation and mere containment. It is, moreover, not unduly bold to suggest that given the reach, scope and tenacity of the prison – its grip on our collective capacity to figure what punishment is – that these tensions are inscribed quite close to the heart of modern political culture. We should not therefore be unduly surprised if in the contemporary scene – especially if we attempt to take a fairly cosmopolitan view of the uses of confinement around the world - we encounter controversy, contention and confusion. We might reasonably expect to see certain of the historic rationales for imprisonment (or certain of the classic arguments against it, or for imposing limits on its use) winning out at different moments. We might anticipate such questions as 'how many prisoners is the minimum required to secure social order and safety?', 'what are the necessary minimum standards for prison regimes?' would meet sharply differing answers at moments of greater or lesser affluence or economic security, perceived political stability or optimism, and so on. We might also reckon that struggle might sometimes ensue between the pressures driving the organization of penal politics in this or that place and time and the universalizing, consistency-seeking claims of Human Rights discourses (Donnelly, 2003; Orend, 2002, chapter 2). Both coercive inclusion and categorical exclusion have at times provided rationales for particular practices of incarceration, not infrequently (for example with reference to different categories of offender or offence – young people on one hand, adult sex offenders on the other, to pick a currently problematic pairing) simultaneously.

CONTEMPORARY CONTEXTS OF INCARCERATION

23. The recent convulsions of incarceration in some Western countries have been quite drastic, even if not entirely without antecedents. Consider the following:



Source: Walmsley, 2000

Figure 1.

24. This is a simple cross-sectional comparison for a few countries at one point in time. As soon as one starts to introduce more comparators², the elements of change over time, correlations between prison rates and others socio-economic and demographic factors or comparisons between sub-national units (such as states of the United States) the picture becomes a complex and confusing one indeed.
25. The most striking and widely discussed example of rapid and seemingly unconstrained growth in prison population is the United States since about 1974. (There are other historical examples of convulsive change (see further Zimring and Hawkins, 1991). There are also good reasons to see the currently very high US population as more strongly tied to the distinctive features of that country's history and culture than might appear from the seeming discontinuity of its recent upsurge (Gottschalk, 2006). To discuss the dynamics of that growth, let alone its comparisons with other parts of the world, further here would consume the entire space available. Suffice to note that: at the time of the writing the prison population of the United States is above 1% of the entire adult population; that one in nine young black men is behind bars, and that African Americans now comprise more than half of all prisoners (Gottschalk, 2008). Where relevant research exists it appears overwhelmingly the case that those who comprise the prison population in any country are preponderantly poorer, less educated, less qualified, less employable, more likely to have experienced mental illness, and more likely to belong to ethnic or religious minorities than the general population.

² Consult for example the wide-ranging prison population data collated at: http://www.kcl.ac.uk/depsta/law/research/icps/downloads/wppl-8th_41.pdf

26. Under certain conditions, as Zimring and Hawkins have commented (1994), prison populations appear to have 'an open-ended capacity for change'. But what are those conditions? What factors dispose decision-makers at certain historical moments to continue to, so to speak, place their wager on the prison, as having some major part to play in achieving their ends? To what extent is it plausible to read the last quarter century of penal change, especially but not only in the United States³, as a rather distinctive indicator of social and economic transformation and of change in political culture?
27. One influential interpretation – mainly directed towards American and British experiences – sees the 'penal-welfare complex', associated with the development of the institutions of 'modern' welfare states as being superseded, or at least severely challenged by a rather different 'crime complex' (Garland, 1996, 2001; Garland and Sparks, 2000). On this view what has occurred in the last quarter of the twentieth century has been a transformation in penal values and practices ushered in by a yet wider set of economic, social and technological changes summarized by Garland, echoing Giddens, Bauman and others, as 'the coming of late modernity'. What this means in practice is that a new 'collective experience' of crime and insecurity combines with a new range of technical possibilities and policy devices to produce a set of 'adaptations' markedly different from those that preceded them. The new 'crime complex' is one in which responsibilities for control are simultaneously both more dispersed and more intensely politicized. On one hand we as citizens and consumers are increasingly rendered responsible for the protection of our safety and property through appropriate private choices (of housing, insurance, transport and so on) whilst on the other there is a clamorous politics of vindication around criminal victimization and the punishment of offenders. The enhanced awareness of risk and the increased salience of crime in everyday life situate the pursuit of safety as normal, pragmatic and everyday. Yet at the same time these conditions impose new pressures on political actors. The growth of crime – and more critically the durable public perception of the relentlessness of its growth -- sharply exposes the limits of state capacity, but as well as stimulating the whole array of pragmatic, adaptive responses this incites a more reactive, gestural penal politics as decision-makers strive to demonstrate their strength and display solidarity with victims and their angry and indignant supporters. Thus even as the inherent limits of the sovereign state become more visible, so 'the criminal justice state' also grows.
28. The result, Garland and Sparks claim (2000: 200), is a change in 'the rules of political speech'. Crime control ceases to be a routine, bi-partisan, administrative job; rather it is an urgent political priority, a bone of continual tension, a site of claim and counter-claim, a resource for electoral advantage but also a site of risk. Politicians are called-upon to express sorrow and indignation, to demonstrate solidarity with victims and condemnation of offenders, and to declare the absolute primacy of public protection as an article of faith. Yet if politicians stake their claims to legitimacy on their toughness and capability in crime control then every shocking crime, every high-profile prison escape and every apparent reverse in the annual crime statistics is potentially a source of political damage – and of course the damage is greatest wherever these failures of crime control, public protection or 'offender management' can be cast as reflecting undue indulgence of or sympathy for 'offenders'. The widely-noted tendency for recent penal politics to be conducted on increasingly 'populist' terms (see below) is one obvious signal of these shifts.
29. Loïc Wacquant proposes a somewhat different reading of recent history. For him the emergence of a new 'penal field' does not result from 'the evolution of crime' but is rather:

³ We should have regard here to, inter alia, the high levels of incarceration in e.g. several of the former Soviet-bloc countries of central and eastern Europe; South Africa; China and the recent growth in imprisonment in e.g. the United Kingdom and the Netherlands.

a reaction to — and a diversion from — the social insecurity produced by the fragmentation of wage labor and the destabilization of ethno-racial hierarchies following the discarding of the Fordist-Keynesian compact. It partakes of a new government of poverty wedding restrictive “workfare” and expansive “prisonfare,” which ensnares the precarious fractions of the post-industrial proletariat in a carceral-assistential net designed to steer them towards deregulated employment or to contain them in their dispossessed neighborhoods and in the booming prisons that have become their satellites. (Wacquant, 2008)

30. One distinct value of this approach for present purposes is that it speaks quite directly to some of the more far-reaching human rights problems associated with the phenomenon of mass incarceration. Thus Wacquant argues:

These punitive policies are the object of an unprecedented political consensus and enjoy broad public support cutting across class lines, boosted by the blurring of crime, poverty, and immigration in the media as well as by the constant confusion between insecurity and the “feeling of insecurity.” This confusion is tailor-made to channel towards the (dark-skinned) figure of the street delinquent the diffuse anxiety caused by a string of interrelated social changes: the dislocations of wage work, the crisis of the patriarchal family and the erosion of traditional relations of authority among sex and age categories, the decomposition of established working-class territories and the intensification of school competition as requirement for access to employment. Penal severity is now presented virtually everywhere and by everyone as a healthy necessity, a vital reflex of self-defense by a social body threatened by the gangrene of criminality, no matter how petty. (Wacquant, 2008: 11)

31. In Wacquant’s vision the new penal state is one designed to deal with ‘castaway categories’ of unassimilated, unwanted and unnecessary people. Its historic interest in inclusion or reintegration, however problematic and attenuated these may have been in reality, now wanes to a residual level: as the welfare state retreats so the penal state grows. Mass imprisonment is a key dimension, on this view, of the new government of the poverty, with obvious correlative consequences for both indigenous and immigrant minorities. ‘Logically’, Wacquant argues, ‘the prison returns to the forefront of the societal stage, when only thirty years ago the most eminent specialists of the penal question were unanimous in predicting its waning, if not its disappearance’ (2008: 15).
32. Wacquant insists that social policy and penal policy are not ‘separated and isolated domains of public action’. Rather ‘in reality they already function in tandem at the bottom of the structure of classes and places’. This has a bearing on the relations between penal politics and, to mention but two, migration and public health. A similar argument might be made in respect of social control and human rights more generally. In that they are, in Wacquant’s view, part-and-parcel of the neo-liberal ‘rolling back’ of the social state, these new institutional arrangements are also actively *exported*, for example to Europe and to Latin America (ref Brazilian reception of W’s work). Thus the new gadgets and devices - and the think-tank pamphlets and consultancy opportunities facilitated by the requirements of the extension of the penal field – impel the phenomenon of ‘policy transfer’ to a new level of intensity.

COMPARING (EUROPEAN) PENALTIES

33. Contemporary societies may experience some similar macroscopic pressures but they do not respond to them in identical ways. For example, some European scholars have seen the work of writers such as Garland, Wacquant, and Simon (2007) (not always fairly) as illicitly generalizing from the American instance and in the process riding roughshod over sharply divergent national experiences. On this view globalizing and convergent trends rub up against and are inflected by distinct and persistent local cultural and political dynamics. Key themes include those of

degrees of exposure either to neo-liberal economics and social policy or to divisive politics of race and immigration, or both (see for example discussions on these issues in respect of Italy (Melossi, 2003), Spain (Calavita, 2005) and The Netherlands (Downes and van Swaaningen, 2007). On the other hand some European nations have demonstrated a certain resilience in resisting the lure of ‘governing through crime’ (Simon, 2007) (see for example Lappi-Seppälä (2007)).

34. Punitive pressures and expansionist tendencies thus appear to be very much more pronounced in some places than others. They depend in part on the preparedness of political actors to play the games that penal populism requires (something that arises as an almost irresistible pressure in certain contexts but which appears more manageable in others). Thus Tonry (2007) has influentially argued against over-generalizing claims. Even adjacent countries, subject to quite similar macro-level pressures appear capable of behaving in significantly different ways in their penal politics: legal and constitutional factors, religious traditions, internal inequalities and divisions and so on, may all matter in the extent to which such societies are exposed to the ‘penal temptation’, and more especially when and whether they succumb to it either in terms of the scale of imprisonment or in terms of its qualitative characteristics.
35. Nicola Lacey (2008) has recently sought to extend the tradition of studies of the political economy of punishment in more expressly comparative direction, and to bring that tradition into dialogue with more recent work on ‘varieties of capitalism’ (Hall and Soskice, 2001). Lacey argues that those countries which stand further in the free-market direction along a continuum between ‘liberal’ and ‘coordinated’ economies are more likely than their neighbours to inflict harsher criminal penalties – and particularly to sustain larger prison populations – roughly in inverse proportion to their investment in socially inclusive practices such as post-compulsory vocational training and universal welfare benefits. Conversely those countries that are, paraphrasing Wilkins and Pease (1987; Pease, 1990), more ‘tolerant of inequality’, seem also to ‘tolerate’, or accept as inevitable, more profound exclusions, including exclusionary penalties such as longer and/or more frequent terms of imprisonment. Such societies seem to stand more acutely in danger of succumbing to what Wacquant (1999, 2007) has called the ‘penal temptation’, namely the tendency to convert questions of social steering, order-maintenance and assimilation into problems *for* the criminal justice system.
36. Lacey further relates this to political and constitutional arrangements such as voting systems. In her view the potential for over-drawing distinctions between political parties, and the attractions of grand-standing populism in matters of crime and punishment, are accentuated under first-past-the-post, majoritarian systems. This is an argument that other recent evidence (for example David Green’s telling account of media and political responses to child murders in Britain and Norway (2007)) seems to corroborate. Lacey presents a compelling argument for careful comparative study amongst proximate cases, such as the penal systems of Western Europe.⁴ Green’s observations also serve to remind us that these phenomena also have qualitative dimensions (it’s not just all about prison numbers). We thus now turn to examine, first, questions of penal populism and legitimation in relation to the dynamics of prison expansion and, second, in relation to questions of order and control, regimes and material conditions in prisons.

⁴ At this point in the development of the field this does indeed to appear to be a major, emergent focus, as seems also to be increasingly true for the States of the United States, for example (Beckett and Western, 2001; Barker, 2006). A number of scholars such as Tonry (2007), Lappi-Seppälä (2007) and others have begun to explore the penal variations between European nations in increasingly fine detail, and in so doing to emphasize that the elements of political culture and political decision remain of central consequence.

PENAL POPULISM, LEGITIMACY AND HUMAN RIGHTS

37. Pratt (2007) and others give emphasis to what appears to be a standing temptation on contemporary political actors to treat penal questions in *populist* mode. Some aspects of penal policy, in some countries more than others, have lately become demotic, prone to focus on scandals and emotive cases, and given inter alia to playing off the needs of victims and the management of offenders against one another in a 'zero-sum' relationship. As Pratt notes (see also Loader, 2006) populism is a way in which governments 'have allowed those who claim to speak for 'public opinion'- law and order lobby groups, the tabloid press, talk radio hosts and callers and so on - to influence policy development at the expense of elite groups such as civil servants, academics, liberal reform groups and judges and who collectively make up the 'criminal justice establishment'. Populism has something to do with how we characteristically speak about crime and punishment, as well as something to do with the reconfiguration of social relations between political elites and the alliances and mobilizations on which they depend.
38. Penal populism is in some senses a permanent possibility. However its salience and its specific effects appear much more variable. One way of looking at this question is as an aspect of political communication (Sparks, 2000). Sparks proposes that we reserve the term populism to refer to a certain set of *styles or techniques* that are now somewhat pervasive in many branches of journalism, marketing and political communication. Seen in this way it is impossible to argue that there are two (or indeed more than two) distinct tendencies in recent penal developments, only one of which is 'populist'. Rather, the relationship between the technical (managerial, risk-oriented) and the popular would seem to be rather more complicated than this. Indeed, some students of political communication argue that it is precisely the increasing technical complexity of many governmental and administrative processes that generates the need to redescribe them in populist language, or conversely which drives the battle for popular legitimacy onto themes and topics that can be so described. Canovan (2000) argues that populism is one of the inevitable modes of contemporary politics. In her view the very complexity and hence 'opacity' of the 'backstage' practices of governance is itself one of the conditions that favours politicians' recurrent tendency to resort to populist gestures. In place of a candid admission of the often tedious, arcane and unsatisfactory realities of contemporary political and administrative life we find a preference for 'sound-bites', 'spin' and slogans.
39. One interpretation of these developments (e.g. Sparks 2000a, b, 2001, 2003) thus places emphasis on the legitimization problems confronting contemporary political actors in the face of the erosions of their effective capacity by economic and cultural globalization (Bauman, 1998, 2002; Castells, 1997; Loader and Sparks, 2007). On this view the predominance across much of the world's surface over the last couple of decades of neoliberalism – its tolerance of deepening inequalities, its suspicion of former 'social' modes of governance and steering, its invention (or rediscovery) of a plurality of more or less novel control devices (such as the privatization of corrections – see below), the generalized anxieties generated by these convulsions - signals a refocusing of governmental energy and attention on crime and punishment.
40. The advent after 9/11 of the 'war on terror' and a consequent intensification in many countries of the politics of insecurity tends to provide a further ratchet to these dynamics. Whilst this essay is primarily concerned with incarceration, and its alternatives, in the 'ordinary' context of 'domestic' criminal justice, and not with international relations or anti-terror tactics, we ought not to disregard the inflammatory potential for conflation between these. In this regard the prevalence of a sense of emergency or of crisis further foregrounds the centrality of punishment to the legitimization claims of many contemporary states. We should not forget that studies of crime, punishment and control (criminology, for want of a better term) have made their own earlier contributions to accounts of state exceptionalism. For example, Stuart Hall and his collaborators in their landmark work *Policing the Crisis* (1978) – an acknowledged landmark yet oddly sparsely referenced now – observe that moments of particular alarm and their associated

calls for action (crises, in a word) do not 'emerge from nowhere' but rather arise out of a pre-existing field of 'tension, hostility and suspicion' (Hall et al., 1978: 181). They also take the view that 'moments of "more than usual alarm" followed by the exercise of "more than normal control"' tend to be associated with significant historical upheavals and social-political transition (1978: 186). The context has undoubtedly shifted since Hall et al. wrote. Nonetheless, certain of their remarks seem both prescient and still pertinent, even if we will also need to revise or extend them. One question that animated Hall and colleagues was what might happen when circumstances conspired to bring political leadership and cultural authority into particular question (see further Sparks, 2006).

41. Nils Christie has argued that states must be seen as having *chosen* the levels of incarceration that they display. The volume of recorded and unrecorded crime in most contemporary societies is indeed very large - there is plenty of 'raw material' over which punishment choices may be exercised. Moreover, the scale of the problem, and especially its more shocking and dramatic aspects is insistently emphasized in media coverage (Hall et. al., 1978; Ericson et. al., 1991; Schlesinger and Tumber, 1994). It is therefore always possible for politicians to invoke 'public opinion' and social defence in the decision to get tough.
42. The relationship between punishment and public opinion is no less complex than that between punishment and crime. As Zimring and Hawkins point out evidence from American opinion polls since the early 1970s suggests that a substantial majority of those polled reliably express the view that the courts are too lenient. Moreover this settled perception has shown no sign of responding to the actual increases in penal severity that took place during the 1980s (1991, p. 129). Rather, a state of public dissatisfaction with the perceived leniency of the courts appears to be a 'chronic condition': it expresses public concern and anxiety rather than a detailed knowledge of real penal practice. If this strand in public sentiment really is a constant feature of contemporary social life it follows that any increase in penal severity could always be legitimated in terms of 'public opinion'. In this respect 'public opinion' is a sort of 'pool' - a resource that can be called upon in opportunist and episodic ways to legitimate political decisions:

The ad hoc reference to punitive public attitudes when the prison population increases is analogous to the attribution of rainfall to the performance of a rain dance while conveniently overlooking all the occasions when the ceremony was not followed by rain but by prolonged periods of drought.

Zimring and Hawkins, 1991, p. 130

43. This is why both Christie and Zimring and Hawkins stress the open-ended nature of prison expansion. This is perhaps particularly evident when one possible function of imprisonment for crime control is touted with special vigour. In the United States that function has been incapacitation (Wilson, 1975; van den Haag, 1975; Zedlewski, 1987). It is a function especially suited to provide the motor of penal growth since

As long as levels of crime are high enough to generate substantial anxiety, those who view increased imprisonment as a solution will continue to demand more prisons and will do so in terms that do not change markedly at any level of incarceration. Indeed the more attenuated the relationship between the malady and the proposed remedy, the more insatiable will be the demand for more of the remedial measure. (Zimring and Hawkins, 1991: 104)

44. Pratt (2008) suggests that the strategic policy choice to accentuate the necessity of penal expansion is one that tends to be exercised under conditions of declining political legitimacy, and in the interests on the part of elites of recovering their reputation for strength, capacity and relevance. Drawing upon the views of the political theorist David Beetham (1991) Pratt argues that penal populism is best seen as a response to a growing 'legitimacy deficit':

A system of power will lose its legitimacy when it is exercised in a manner that contravenes, exceeds, fails in or departs from existing conventions and expectations. When this happens, a legitimacy deficit emerges between the dominant and the subordinate groups. This will have an effect on the 'levels of cooperation and quality of performance and on the ability of the powerful to achieve goals other than simply maintaining their own position' (Beetham, 1991, p. 28). Indeed, a legitimisation crisis can be said to occur when there is a serious threat or challenge to the rules of power (Beetham, 1991, p. 168), especially when those who challenge it seem to have the potential to remedy these deficits by demanding a greater share of power themselves. Under these circumstances, there is likely to be a significant realignment of power relations which will involve a shortening of the social distance between the dominant and the subordinate and some reversal of their roles.

45. The consequences of these dynamics for considerations of Human Rights are by now apparent. The translation of episodic scandals and crises into a durable condition of social alarm favours the imposition of more liberty-depriving sanctions, the erosion of procedural safeguards, the creation of suspect populations, and not infrequently the resort to 'magical' or gestural solutions even in the face of contrary evidence:

Along with the use of retrospective legislation, the emphasis now given to indeterminate prison sentences, the use of punishments disproportionate to the crime committed and new post-prison powers of surveillance, control and restriction have helped to rewrite penal law in a way that discards many of the restraints that had been imposed on the power to punish since the Enlightenment. These restraints had been intended to prevent excesses and had been overseen by the criminal justice establishment as they developed policy on the basis of economic costs, reconviction rates, humanitarianism and 'general decency' (Loader, 2006). However, as this realignment has taken place, the influence of penal populism has prioritised community interests over the rights of individuals and effectiveness is more likely to be judged on the basis of commonsensical notions of deterrence, incapacitation and satisfaction to victims.

46. However, as Pratt further emphasizes such trends may be neither inevitable nor irreversible. Legitimation claims may be staked on grounds other than simple toughness. Decency, rationality, consistency, proportionality, conformity with evidence and compliance with internationally acknowledge human rights norms all compete with penal temptations in struggles to define the 'mood and temper' of the polity. Thus criticism of British anti-social behaviour legislation by Alvaro Gil-Robles, the then Council of Europe's human rights commissioner in 2005⁵, or by Amnesty International of New Zealand's internationally exceptional prison population in the same year did not go entirely un-heeded. The latter, Pratt argues, came to be experienced as humiliating and as 'damaging New Zealand's international reputation for social justice, egalitarianism and tolerance'. At a certain point the tone of media reporting and public discussion in New Zealand, Pratt argues, underwent something of a reversal. Reports of remand prisoners sleeping overnight in vans parked in the street because of the 'bulging prisons', or of increasing numbers of suicides, began to appear shameful and inconsistent with a national self-understanding. Prison expenditure began to be reported as a wasteful 'blow-out'. 'Penal populism', Pratt remarks, 'no longer had a monopoly on scandal'. Nevertheless the more frequent condition seems to be one in which widespread societal unease about security and state capacity translates into demands for tough action, often with limited patience for human rights considerations. As Rodley (2001: 52), writing with reference to prisons in Brazil, in his capacity as Special Rapporteur to the UN Commission on Human Rights, succinctly observes:

As the Special Rapporteur has found in several countries, there is widespread public disquiet about the level of ordinary criminality, breeding a pervasive sense of public insecurity leading, in turn, to demands for draconian official reaction, sometimes without legal restraint. There has been a practice of some politicians and political parties to exploit this fear for electoral purposes.

⁵ See: <http://www.guardian.co.uk/uk/2005/jun/08/eu.humanrights1>.

LOCAL AND GLOBAL (ALL OVER AGAIN): SOME INTERIM CONCLUSIONS

47. The circulations of penal discourses and practices are properly considered as phenomena of global dimensions. Moreover the connections established in this context between public policy, social control and (risks to) human rights are both intrinsic and profound, even if they need to be more carefully spelled out than is often done. The picture is however complex and varied:
- i) The filtration of generic themes and rhetorics into the political cultures of diverse nation-states is in no way uniform or inevitable. To date most demonstrations of this have focused either on the multiple differences in resort to incarceration between European countries, the region for which these variations have been most thoroughly discussed and evidenced, or latterly the local politics of the states of the United States (for example: see e.g. Barker, 2006). Whilst Europe is by far the most intensively researched region in this regard there is also increasing evidence from Latin-American and Asian-Pacific criminologists to suggest comparable dynamics (e.g. Hamai and Ellis, 2006)
 - ii) The question thus arises of how some countries have managed to moderate, if not evade entirely, the transformations posited above – and of what if any transferable conclusions we might infer from this resistance?
 - iii) Another indicative line of investigation might through a brief account of the uneven and halting march of *privatization* through the world's prison systems (see below).
 - iv) In terms of their impact on many aspects of incarceration especially in its *internal* aspects (the provision of prison regimes and amenities, material conditions of confinement, access to representation, accountability mechanisms and so forth) Human Rights principles have arguably proven more robust and more strategically significant than the bleaker, more prophetic versions of the 'mass incarceration' thesis would have predicted. This is arguably again most readily demonstrated for Europe (see in particular van Zyl Smit and Snacken, 2009) but by no means exclusively so (see for example: <http://www.kcl.ac.uk/schools/law/research/icps/work/libyamanagement.html>).
48. We might hazard two provisional views, which serve to structure the remainder of the essay. The presence of variation, change and complexity refines rather than contradicts the proposition that the prison is in some sense a global institution (and indeed an institution of globalization). It reminds us, however, both that local politics do not end with globalization, just as many forms of trans-local politics may be enabled by it. Second, questions of state legitimacy remain pivotal both to the scale of the penal enterprise and to its character, with major implications for the role of and prospects for Human Rights institutions and practices in relation to prisons, other penalties and social control mechanisms.

PRISON PRIVATIZATION

49. Early discussion, especially opposition, to privatization strongly emphasized its political and ideological character (Sparks, 1994; Shichor, 1995; Ryan and Ward, 1989), questioning the legitimacy of the delegation of a core state function to private interests. Other critics saw in this development the means to facilitate a massive enlargement of penal capacity through the creation of a corrections-commercial complex (Lilly and Knepper, 1991; Christie). For others again its main interest lay in the managed transfer or diffusion of a particular set of techniques internationally – first between the United States and United Kingdom/Australasia and then for global export (Newburn and Jones, Wacquant). Advocacy, at least overtly, tended towards a more pragmatic tone, representing private management of prisons as a means towards improvement in service delivery (Logan, 1990; Harding, 1997) and a lever in the cause of

reforming archaic systems and 'dinosaur' unions. The striking managerialism of much prisons discourse (the performance indicators, consumer surveys and so on) bear witness to the influence (by no means always unambiguously negative) of these developments, even on prison services still under public management.

50. Let us briefly try to recover the terms of this earlier, more principled, phase of the debate. In its early stages it was still fairly clear that there was a moral and ideological dispute at stake in arguments over prison privatization. Most of those who argued most eloquently in favour of privatization were also strongly convinced of the virtues of liberal 'free market' economic and political theory more generally. Thus Charles Logan asserted quite clearly:

The privatization of corrections, or punishment, is an especially significant part of the broader privatization movement. By challenging the government's monopoly over one of its ostensible 'core' functions, this idea directly threatens the assumption that certain activities are essentially and necessarily governmental.

(Logan, 1990, p.4)

51. Logan astutely never denied that private prisons generate and encounter moral and practical problems, only that these are not directly to do with their private or 'contractual' character:

It is primarily because they are prisons, not because they are contractual, that private operations face challenges of authority, legitimacy, procedural justice, accountability, liability, cost, security, safety, corruptibility and so on. Because they raise no problems that are both unique and insurmountable, private prisons should be allowed to compete (and cooperate) with government agencies so that we can discover how best to run prisons that are safe, secure, humane, efficient and just.

(Logan, 1990: 5)

52. Thus, provided we accept i) a certain definition of the responsibilities of the state (broadly that it is there to see to it that certain tasks are carried out) and ii) that imprisonment is such a 'function', then the delivery of that task by certain delegated agents becomes unproblematic, in theory if not in practice. In essence privatization (like the privatization of telephones or electricity) is simply a strategy of social policy. It is to be judged primarily on its quantifiable effects. The consequentialist view in favour of prison privatization had three main strands: i) to institute a split between the purchaser and the provider of a service; ii) to open the provision of such 'services' to the stimulus of competition; and iii) to enhance accountability by breaking up 'monolithic' public services.
53. Advocates argued that these measures would make the state less prone to conceal or gloss over its own failures. Instead it would ruthlessly police its contractors for signs of inefficiency or abuse. Moreover, contractual arrangements are inherently explicit whereas governmental administrative procedures are commonly permissive and discretionary. Oversight and monitoring are thereby facilitated and accountability increased.
54. Many objections to privatization are, by contrast, *intuitionist*. They begin and end with the feeling that 'it is wrong to profit from punishment'. For those who hold this position strongly no further argument is possible or necessary. Such a view might contend that the pro-privatization position may be correct in points of detail but still not touch the main concerns in the arguments about the nature of state punishment and the justifications for imprisonment. If this is correct, privatization misconceives what is really at stake politically, ideologically and economically in the operation of penal systems. Let us outline three specific sets of objections to privatization initiatives.
- i) Is privatization wedded to growth in the prison population? Privatization moves have to date primarily occurred in earnest in the Western industrial states in those jurisdictions which have experienced the most prolonged and severe problems of high prison populations and high overcrowding - principally the United States and Great Britain. If privatization generally

gains momentum and plausibility under the pressure of such contingencies does this compromise its general claims to offer a preferable model for the future of prison systems as such? Thus privatization offers itself as a policy solution in those situations where prison populations are regarded as escaping willed political control.

- ii) Is privatization wedded to 'warehousing'? More speculatively, one might argue that there is an elective affinity between the provision of privately managed prisons and particular philosophies of sentencing. The sentencing principle most commonly espoused to date by private interests in the USA in their advertising is that of incapacitation. Its focus is on the provision of adequate space in which humanely to contain: 'We help separate the outside world from the inside world' (Electronic Control Security Inc). Is it the case that privatization is intrinsically tied to what a number of radical critics have identified as a key function of contemporary penalty, namely the containment of 'surplus' or dangerous populations (Mathiesen, 1990; Wacquant, 2008).
 - iii) Is there a 'corrections-commercial complex'? Lilly and Knepper (1992b) deployed this term by analogy with Eisenhower's prescient warning of the influence of the 'military-industrial complex', since when it has been used extensively. The two positions are strikingly comparable. In each territory there is only one domestic customer (the state - or in the US the individual states and the federal government) plus the obvious export markets (other states). The state contracts for what it regards as a vital function. It thus develops close relations of mutual dependency with its contractors and these of necessity are continuing (see also Shichor, 1993). Far from Logan's optimistic vision of a state free to hire and fire contractors at will in the event of unsatisfactory performance or a reduction in demand, the more likely outcome is one of a high level of dependency on a small number of near-monopoly providers. What might result in such market conditions a routine exchange of expertise and personnel between government agencies and corporate contractors? In Lilly and Knepper's view this exchange can be characterized as constituting a 'sub-governmental system' (1992b: 45). Governmental and private experts interact regularly and in private, and identify the outcomes of the mutual deliberations as constituting the public interest. All of this raises issues of the most basic kind for accountability and political control (not to mention ethical propriety and financial management).
 - iv) Can the state delegate coercive powers? The simple, descriptive answer to this question would now appear to be yes it can and does. As we have seen the logic of the privatization case rests on a distinction between the allocation of punishment and the oversight of its administration (the state's responsibilities) and the practical provision of services (the private sector's role). Prisoners enter prisons by compulsion and during their confinement the responsibilities which authorities undertake for their well-being are very extensive. As such they involve practical and symbolic issues of authority and liability.
55. In the face of the entrenchment/normalization of private sector involvement research interest has, with honourable exceptions (e.g. Harding, 2001) waned shamefully, leaving the documentation of the industry and its activities to a handful of relatively isolated scholars (such as Nathan). The blogosphere buzzes with arguments about privatization; the academic journals are largely silent. One of the most thorough and authoritative recent discussion of human rights in the context of prison law (van Zyl Smit and Snacken, 2009) makes only one passing reference to the topic.
56. On one hand the global spread of private prison industries has been slower and more partial than many would have predicted, and there have been a limited number of at least partial de-privatizations (New Zealand, Scotland), worthy of special mention. In both these cases it is interesting to note that the decision to rescind interest in private imprisonment did coincide with a shift in policy direction in favour of reducing prison numbers and developing non-custodial

‘alternatives’. Thus, whilst Wacquant is very likely correct in arguing private sector involvement is not in itself the motor of growth in prison populations and that talk of the ‘corrections-commercial complex’ involves an element of hype, political choices in favour of parsimony seem to show some affinity with a reversion to the former, state-provided, pattern. Meanwhile, however, in some of the more persistently expansionist jurisdictions – notably England and Wales where all newly built prisons are expected to be privately managed – the number and proportion of contracted-out prisons continues to rise quite sharply (despite mixed internal evidence of their performance⁶).

57. The privatization ‘debate’ leaves the original questions of principle (the legitimacy of delegating the execution of punishment to a contractor) unresolved, whilst continuing to raise tricky questions about transparency, accountability, governance, corruption and the monetization of prisoners’ entitlements. Serious work on the practical comparisons of regimes as delivered and experienced (Camp and Gaes, 2002; Gaes et al., 2004; Liebling, 2004; Rynne et al, 2008) is only now appearing.

LEGITIMACY, HUMAN RIGHTS AND PRISON REGIMES

58. The legitimate character of the prison’s internal order is always and necessarily in question (Sparks et al, 1996; Sparks and Bottoms, 2007). Increasingly, considerations of human rights are central to determinations of the extent of that legitimacy, its deficits and crises.
59. On at least some ‘traditional’ and quite widely-held views this statement remains controversial. Prisons, as uniquely coercive and intrusive institutions escape or deny such considerations. In a recent review of the theme Bottoms and Sparks (2007) acknowledge the tenacity of such arguments. For example, in an important critical statement Scraton et al. (1991: 63) referred to the ‘unrelenting imposition’ of control on the unwilling as the sole means of keeping the lid on what would otherwise be a ferment of rebellion. Meanwhile DiIulio had argued in *Governing Prisons* (1987) that precisely *because* prisons are, in the eyes of prisoners, inherently non-legitimate and hence unruly, they are ungovernable except by the judicious use of compulsion and sanction. DiIulio therefore concluded that the best form of prison management (‘the control model’) is a benign and efficient authoritarianism, tempered by the scrupulous observance of procedural form and limited individual due-process rights. (For a fuller discussion of these contending positions, and their convergent implications, see Sparks et al., 1996: chapter 2; Sparks and Bottoms, 1995). Similarly, Carrabine (2004) has argued strongly that power in prisons generally represents an inevitable “external fact” for prisoners – in which the experience of confinement is simply *endured* without any reference to some version of legitimacy. On this view it is unavoidably the case that for many prisoners, it is the apparently overwhelming power stacked up against them that secures their assent; thus, their compliance is based on what he describes as ‘dull compulsion’, rather than legitimacy (see also Sim, 2008: 144).
60. Let us be quite clear in acknowledging that the potential for prisons to reduce to the conditions of secrecy, routine brutality, exploitation and plain force is inherent in them. Indeed it is plausible to suggest that historically and globally this may have been the predominant situation. In the absence of external oversight and accountability, and hence of any credible guarantee of the enforcement of legal standards or human rights norms; and in the face of factors such as chronic overcrowding, resource constraints, lack of training and support to staff, ethnic tension and so on; and, frequently, in political climates characterized by discourses of fear, insecurity, resentment and demands for stringent action; it should come as no surprise if prisons are degraded, fearful and violent places. The following examples (but these are just examples –

⁶ See: <http://www.independent.co.uk/news/uk/home-news/private-prisons-performing-worse-than-staterun-jails-1722936.html>

there are so many cases from which these instances might be drawn, in strikingly similar terms) again come from Rodley's work as Special Rapporteur to UNHCHR and refer to Brazil:

The Special Rapporteur visited the punishment cells where, according to the registry, eight detainees were currently held. Eight detainees, half-naked, were in fact detained in very basic conditions. Most said that they had been punished for having fought with other detainees and some complained of having been beaten by prison guards when they were transferred to the punishment cells. All agreed that a dozen detainees, who were believed to be in bad condition from the beatings to which they had allegedly been subjected after an attempted escape, had recently been removed from the punishment cells.

The Special Rapporteur then visited the cells from which the detainees being punished were said to have come. Their co-inmates said that on 28 August their cell had been searched after an attempted escape during the night of 26/27 August. They did not know why they had been targeted, as the escape attempt was from another cell. After the search, some detainees complained that personal items had disappeared. It is believed that because of these complaints, they were allegedly taken, through the so-called Polish corridor, to the courtyard where they were severely beaten by some 50 prison guards along with members of special forces of the police using wooden clubs and iron bars, some with wires tied around them, for five or six hours. The Director and Subdirector in charge of security were said to have participated in the beatings. One detainee had been seriously wounded. On the same day, he had to appear in front of a judge, who was believed to have ordered him transferred to a hospital. The 70 detainees in the cell all bore visible and recent marks (bruises, haematomas and scratches on various parts of the body) consistent with their allegations. They claimed that five detainees, who were said to be in bad shape and whose names were given to the Special Rapporteur, had been taken out of the cell just before the Special Rapporteur arrived. The guards said that the detainees had been taken to the Forensic Medical Institute, but would be brought back to Muniz Sodré the same night if vehicles were available. The Special Rapporteur waited for several hours but the detainees did not appear.

61. In cases such as these the reduction of prison life to 'bare life', and the ratio, so to speak, of mere force to legitimate authority is many degrees more extreme than in the British cases reported by Sparks et al., Liebling and others, or most of the European instances cited by Van Zyl Smit and Snacken. In such conditions 'dull compulsion' and outright force do indeed appear to be the basis of rule.
62. No one can seriously suppose that the question - can prisons be legitimate? - is ever likely to receive overwhelmingly positive answer. On the basis of earlier empirical work (Sparks et al., 1996), Sparks and Bottoms were left in no doubt that legitimacy was a vexed issue in relation to prisons. It appeared most unlikely that any actually existing prison had somehow cracked this conundrum. It always seemed more plausible to argue that prisons are arrayed on a spectrum of varying degrees of legitimacy deficit. To address question of penal ordering in terms of legitimacy therefore is not to provide some sort of apologetics on behalf of any current practice or institution. Prisons do not in general bask in the warm approbation of their captives, as everyone agrees. In the empirical cases that Sparks et al. observed key features of the everyday practice of each had developed precisely as responses or adjustments to the limited legitimacy that they each enjoyed and in response to the crises that they had either experienced or feared.
63. Yet the very fact that prisons might be deficient in point of their legitimacy in varying degrees or in various ways suggests that legitimacy is indeed usually an issue for them. It is a concern that shapes practice. It emerges in the ways in which members of staff regulate their own and one another's behaviour. It is conveyed in the vivid stories that prisoners tell that evaluate their treatment in different prisons or their handling by different officers. Its violation is made manifest in the outrage and indignation that prisoners express over small misuses of discretionary power - the peremptory treatment of their visitors, for example, or the over-zealous application of the letter of the law in relation

64. to important things like food, exercise, mail, and so on.

65. These attempts to re-instate the significance of legitimacy (and its erosions and absences) to prison studies drew extensively on the work of the British political theorist David Beetham. In Beetham's view the modality of power which stands most in need of legitimation is not democratic discussion, which claims to be inherently self-legitimizing, but force. For

...the form of power which is distinctive to [the political domain] - organized physical coercion - is one that both supremely stands in need of legitimation, yet is also uniquely able to breach all legitimacy. The legitimation of the state's power is thus both specially urgent and fateful in its consequences.

(Beetham, 1991: 40)

66. Legitimacy and power are, on this view, two faces of the same problem. The content and strength of legitimating beliefs radically affects all parties in a system of power relations and only legitimate social arrangements generate normative commitments towards compliance. Beetham (1991) thus argues that all systems of power relations seek legitimation. He contemplates a very few exceptions, such as slavery. This is surely quite interesting from the vantage point of the present discussion. It might be argued that whether one thinks legitimacy is a relevant consideration in prisons comes down to whether you consider imprisonment to be more akin to slavery than to other, supposedly more contemporary institutions.

67. The particular content of legitimating beliefs and principles is extremely historically and culturally variable but, Beetham contends, we can identify a common underlying structure which is very general (1991: 22). On Beetham's account that structure has three underlying dimensions or criteria in terms of which the legitimacy of any actually existing distribution of power and resources can be expressed and evaluated. Such criteria are almost never perfectly fulfilled, and each dimension of legitimacy has a corresponding form of non-legitimate power. In outline, Beetham (1991: 20) expresses his schema thus:

<u>Criteria of legitimacy</u>	<u>Form of non-legitimate power</u>
i) conformity to rules (legal validity)	illegitimacy (breach of rules)
ii) justifiability of rules in terms of shared beliefs	legitimacy deficit (discrepancy between rules and supporting shared beliefs, absence of shared beliefs)
iii) legitimation through expressed consent	delegitimation (withdrawal of consent)

68. These three dimensions roughly correspond to the traditional preoccupations of three different academic specialisms which have considered issues of legitimacy: first, lawyers (has power been legally acquired, and is it being exercised within the law?); next, political philosophers (are the power relations at issue morally justifiable?); and finally, social scientists (what are the actual beliefs of subjects about issues of legitimacy in that particular society?) (Beetham, 1991: 4ff). However, a central plank of Beetham's argument is that social scientists have been wrong to follow Max Weber (1968) in defining legitimacy as simply 'belief in legitimacy on the part of the relevant social agents' (Beetham 1991:6). To promote this view, Beetham argues, is to leave social science with no adequate means of explaining why subjects may acknowledge the legitimacy of the powerful in one social context, but not another (ibid: 10). Beetham accordingly argues for an alternative formulation of the social-scientific view of legitimacy – 'a given power relationship is not legitimate because people believe in its legitimacy, but because it can be justified in terms of their beliefs' (ibid: 11).

69. How far does all of this really matter on the ground? And what is the relevance of Beetham's insistence on this seemingly rather fine distinction between his views and those of Weber? We can perhaps re-express some of what is at stake in this debate in much simpler terms. First, people in authority are generally well advised to follow the rules prescribed for their own behaviour. Second, they should act in accordance with commonly agreed moral standards in the society in question. To the extent that they do these things they have a much better chance of having the legitimacy of their authority accepted than if they don't, even in the apparently unpromising setting of a prison.
70. Some (but not necessarily all) regime conditions can seem to prisoners to be deeply unfair, and some decisions made by prison staff can seem, for example, capricious in outcome, or arrived at without properly listening to the prisoner, and in either case unfair. To the extent that such situations are ameliorated, however, prisoners are frequently willing to admit that particular regimes, or particular kinds of staff behaviour, are relatively fair rather than unfair. In such contexts prisons can indeed appear more or less legitimate to prisoners.
71. This is not to argue that in prisons prisoner compliance is simply the result of assent to the legitimacy of the regime. Naturally enough the situational controls available in a prison – cells, gates, secure corridors, and so on – are major dimensions of the maintenance of order; and prisoners are subjected to various kinds of incentives and disincentives, though in fact those are less powerful weapons in prison than many outside observers initially imagine (Bottoms 2003). In short, legitimacy is only one element in the overall production of order in prisons, but on this view a crucial one.
72. Criteria of legitimacy are not just based on assent, they are also based on standards of fairness generally accepted in society at large. A prisoner appealing to those standards of fairness draws attention to a genuine legitimacy deficit that will resonate in wider political debate if it reaches forums such as a parliament, a public inquiry, or a court of law. A prisoner making far-fetched demands (such as – to take a real example – 'don't patrol our exercise yard – you're invading our privacy') will have no impact on wider debates. Most prisoners intuitively understand this difference, and they know that only the first kind of claim is really about legitimacy. Amongst the implications of this are that it is not only the bare, objective facts of a prison regime (how many hours unlocked? how much access to gymnasias or education? and so on) that matter in prisoners' estimation of the fairness of their treatment. Their perceptions of the fairness of the staff in matters such as manner, even-handedness and the quality of explanations given in case of problems are perhaps the most crucial factors of all in determining whether or not prisoners see the prison as operating in a legitimate manner.
73. Legitimacy is fundamentally a political concept. It refers to the relations between parties who are very differently situated in a distribution of power, and to the capacity of the more powerful to constitute their position as authorized and justified, especially in the eyes of the less powerful. For all the multitude of ways in which prisons are special and unusual places, in which special and unusual practices go on, and special and unusual problems arise, this way of conceiving the problem ultimately emphasizes the continuity between the analytic terms of art that we need to understand prisons and those we apply to other settings and institutions.
74. For example, there is an important sense in which the prison staff may be said to embody, in prisoners' eyes, the regime of a prison, and its perceived fairness. In this regard there is an important consonance here with the work of Tyler and his associates on policing (but also with some work on less obviously linked themes in regulatory studies, such as tax compliance) (Tyler, 1990; Tyler, 2001a). Amongst the primary conclusions of Tyler and colleagues are that: people, including offenders, who find themselves treated fairly are more inclined to accept even unfavourable outcomes; citizens who view police officers and judges as lacking in legitimacy are less likely to follow their directives; citizens who view the law as not legitimate and unjust are less likely to obey it; the key antecedent of confidence in the police and courts is that these exercise

their authority through fair procedures; even in high crime areas people's confidence in the police is more strongly linked to whether they feel the police harass and demean citizens, and much less to whether the efforts of the police are in fact lowering crime (see further Karstedt, 2005; Sherman, 2001; Smith, 2007). These points have a special bearing on relations between police and members of visible minorities (cf. Fagan and Meares, 2000), and this is an issue that is additionally salient in the prisons of many countries. The issue of the subject's direct, interpersonal handling by particular agents of 'the system' strongly shapes perceptions of the wider institutions involved.

75. In this respect the seemingly rather special issue of legitimacy in prisons in fact speaks strongly to concerns with the relationship between equity and effectiveness in criminal justice generally, and to a range of cognate questions regarding trust, confidence, credibility, propriety and so on. We do not, however, accept that in the context of the prison legitimacy is only or even primarily a procedural issue. Procedures are, of course, hugely important and prisoners are highly alert to any departure from proper form in the institution's handling of them. Nevertheless prisons are places where everyone is a 'repeat player'. Prisoners and prison staff alike are in one another's enforced company for extended periods; and people know a good deal about one another's business. Prisoners are also in an especially dependent and often highly vulnerable situation with respect to the decisions of officials and the discretionary powers of prison staff. It follows that outcomes are often of particular significance. But so too are informal aspects of interpersonal conduct, even when no 'decision' of moment is involved (see further Crawley, 2004; Liebling, 2004).
76. This account is written on the basis of reflection on empirical research, and from within the perspective of an attempt to contribute to the sociology of social control in prisons. Nevertheless the argument also has a clear bearing on the infiltration of human rights discourses into prison governance. Van Zyl Smit and Snacken (2009: 64-71) have recently argued that human rights thinking provides part of the *lingua franca* of all constitutional democracies and that, through the activities of certain key institutions, principally the organs of the Council of Europe⁷, these are becoming increasingly compulsory requirements upon European prison systems. It also seems to follow, in terms of the line of argument sketched above; that such standards increasingly provide precisely the sorts of generally available criteria of fairness or reasonableness to which prisoners can make reference in contesting the legitimacy of aspects of their treatment.
77. The extension, or withholding, of rights and expectations to prisoners is of practical importance in the governance of prisons. This seems to go beyond the mere requirement that prison authorities act to adjust their practice in light of particular rulings. Rather the settled view of ECtHR that prisons policy should be, *inter alia*, *parsimonious* in respect of prison numbers, *normalizing* in respect of everyday conditions of prison life and oriented towards the *reintegration* of prisoners on their release, is consciously an intervention on the side of certain conceptions of the proper uses of confinement, just as it is an attempt to disbar others. Moreover, in addition to their practical effects, such as these have been, such views constitute an indicative signal concerning prisoners' place in – or limitations on the degree of their legitimate exclusion from – the polity.
78. The development of jurisprudence on these matters frequently runs counter to prevailing public opinion and political rhetoric, especially given the febrile condition of recent penal politics in a number of countries which we have attempted to sketch above. As we have seen media discourse and political utterances often betray vigorous surviving attachment to, for example, doctrines of 'less eligibility', and seek to rally public sentiment around these resources of reaction. Of course such efforts not infrequently meet with a ready audience. The cultural themes on which they call

⁷ This section makes no serious attempt to review all the treaties, protocols, conventions and instruments to have had effects in this area – from UNSMR and ECHR forwards and follows the recent magisterial overview by van Zyl Smit and Snacken (2009) in tracing the development of HR principles in prisons to this root at least in Europe.

have long historical antecedents within the development of the prison and within our expectations of punishment more generally.

79. Yet at least some such venerable themes seem prohibited by modern HR discourse; or at any rate the need arises to justify *which* deprivations or requirements do arise as necessary corollaries of the fact of imprisonment. These conflicts have important consequences for the compromise-formations of outcomes. Consider here for a moment the contention surrounding the recent rulings by ECtHR in the case of *Hirst* that the United Kingdom is not justified in maintaining a 'blanket ban' on prisoners' rights to vote in elections. What is at stake here? Is this something to do with the waning sovereignty of the nation-state in the face of supra-national intrusion perhaps? Or is it simply that the issue touches upon the need politicians may experience to seem to remain in touch with what they take to be popular sentiment – where popular sentiment is *always* interpreted as opposed to the extension of further rights of citizenship to prisoners?
80. In all of these respects arguments over the legitimacy of prison regimes represent unfinished, and perhaps never-to-be-finished, business. In this regard the political energy that accompanies key controversies – sanitation, visiting rights, physical restraint, solitary confinement, access to television and so on – perhaps stands out in clearer relief. On one hand van Zyl Smit and Snacken claim that the advance of HR principles in the governance of prisons is in the process of becoming 'part of a wider European cultural heritage', a penal imaginary through which European citizens define themselves (2009: 384). The stark contrast between this view and the dystopian tendency in the sociology of punishment is to say the least intriguing.
81. We in our time are not less in conflict (we perhaps mean here 'conflicted', at odds with ourselves, not just with others) over the meanings and uses of incarceration than our 18th century forebears at the inception of 'modern' penitentiary confinement. We appear to have arrived at a point where there are serious grounds for concern about the exclusionary impacts of mass incarceration, about the (re)creation of 'castaway categories' of readily punishable people, regarded as carriers of unacceptable risk. Yet we have also arrived at a point where many of the customary grounds for imposing exclusions, deprivations and compulsions on persons enjoy waning legitimacy. Is this something more than a vicious irony, in which an ever expanding population under penal discipline inhabits a set of institutions that have been superficially sanitized and procedurally smartened up? Or is it, as van Zyl Smit and Snacken more optimistically argue, something more far-reaching?

NON-CUSTODIAL PENALTIES AND THE FUTURE INCARCERATION

82. If the modern penitentiary emerged in and from the shadows of corporal punishment, capital punishment and banishment or transportation, from our contemporary perspective it seems to have been a remarkable success – at least in terms of its ability to first colonize and then dominate our conceptualizations of what criminal punishment is. Despite the fact that in most jurisdictions, for most of history (and in the present day), prison has not been the principal mode of criminal sanctioning, there is no doubt that it occupies that position in our imaginations. Ironically perhaps, we bear witness to this fact ourselves, in considering this section to be important as a discussion of *alternatives* to incarceration and in discussing non-custodial sanctions, thus allowing the carceral and the custodial to remain the norm against which other sanctions are to be defined and with which they must compete for credibility and legitimacy. This is despite the fact that the community sanctions and measures (CSM) that are our concern here outnumber sentences of imprisonment in most jurisdictions. Even in the USA, there were more than twice as many people on probation as in custody at the end of 2007; 5.1 million people were under probation or parole supervision at that time (Glaze and Bonczar, 2009). Just as with imprisonment, there is significant racial disparity in the use of CSM in the USA. While 1 in 8 black men in the 20s is in prison or jail on any given day; one in 3 is either in

the care of or under the supervision of correctional services. European figures are harder to establish given the wide range of definitions and forms of community sanctions and differences in official recording of their use. But to give just two examples, in Germany in 2006, there were 65,526 people in custody while 170,273 were on probation. In Latvia in the same year, 2,701 people were sent to prison but 4,750 were under suspended sentences, of whom 1,865 people were on community service (von Kalmthout and Durnescu, 2008). Von Kalmthout and Durnescu's (2008) extensive recent survey suggests considerable expansion of the use of CSM in almost all European jurisdictions; they estimate that if about 2 million people are incarcerated in Europe, then about 3.5 million are currently subject to CSM.

83. CSMs include a range of measures used as alternatives to criminal prosecution (for example, mediation), sanctions imposed at the point of sentencing which are administered within the community (for example, probation or community service) and measures surrounding the early release of prisoners on some form of supervision (for example, parole)⁸. And of course looking beyond those CSM that impose requirements of supervision and submission to some form of intervention, the (unsupervised) fine remains the 'currency of justice' and the most common sanction of all (O'Malley, 2009). As both scholars and policymakers have sometimes suggested, part of the problem of penal expansionism rests in our seeming inability to marginalize imprisonment itself as the alternative sanction (or better as the penal outlier to be used only in exceptional circumstances) in professional, political and public consciousness (e.g. Scottish Prisons Commission, 2008).
84. Perhaps one of the reasons for the failure to marginalize the prison in this way rests in the historical origins of CSM in many jurisdictions, particularly where they emerged not as punishments but rather as measures imposed 'instead of punishment' or as a form of suspended punishment. This peculiar non-status as a mode of punishment may have suited liberal and progressive reformers who were so often trying to *divert* first-time and/or minor offenders from the demoralizing dangers of imprisonment and into nascent forms of social welfare services (for the Scottish example, see McNeill (2005)). However, its legacy in the context of late-modern penal populism and of contemporary public sensibilities has been a legitimization crisis for sanctions cast around remedial, rehabilitative and reintegrative intentions that are seen, rightly or wrongly, as being principally concerned with the interests and needs of 'offenders'. In those jurisdictions where both social trust and welfare provision are in short or declining supply, where inequality is rising and where penal politics is febrile, it is not difficult to see how and why such intentions and concerns cease to connect with public sensibilities. In general terms therefore, the social, economic, cultural and political dynamics described above in our discussion of the works of Garland, Melossi, Simon and Wacquant arguably conspire to produce both a shrinking space for CSM, and to deprive them of the sorts of moral, cultural and political resources upon which they have historically drawn. Instead, CSM tend to be cast as the kind of undue indulgence we discussed above. As Garland (2001) puts it, where the offender ceases to be seen as a 'poorly socialised misfit' and becomes instead either an opportunistic, illicit consumer (to be controlled through target-hardening or increased surveillance) or alternatively a dangerous, threatening outsider (to be despatched, incapacitated or deported), support for more inclusive penal welfarist strategies wanes. This is not to say that CSM themselves decline (witness in fact their growth alongside the expansion of imprisonment), but rather that their

⁸ CSM imposed in lieu of prosecution or as sentences in their own right are sometimes referred to as 'front-door' CSM, those imposed as early release measures are referred to as 'back-door' CSM. The Council of Europe defines CSM thus: 'sanctions and measures which maintain the offender in the community and involve some restriction of his/her liberty through the imposition of conditions and/or obligations, and which are implemented by bodies designated in law for that purpose'. The term designates any sanction imposed by a court or a judge, and any measure taken before or instead of a decision on a sanction as well as ways of enforcing a sentence of imprisonment outside a prison establishment' (Rec. (92)16 on the European Rules on Community Sanctions and Measures).

uses, forms, meanings and character are compelled to change and to find new routes to legitimacy.

85. But before we discuss these changes, it is necessary to note a second problem posed by the origins of CSM as measures of *diversion from* punishment; a problem that may partly explain the slower progress of human rights discourses in the field of CSM than in the field of imprisonment. This problem rests in the sense in which the origins of CSM in many jurisdictions lie in acts of sovereign or executive clemency or mercy. Thus recipients of CSM were seen not as being diverted from punishment because they *deserved* to be so diverted; rather they were granted CSM (whether probation or parole) because the state elected not to proceed with the measures of punishment to which it *was* nonetheless entitled. As philosophers of punishment have pointed out (Smart, 1969; Murphy, 1988; Walker, 1991) part of the point of mercy is that it is undeserved and for that reason it is not something to which someone can easily extend a rights claim.
86. Though in many jurisdictions CSM now find themselves located in an explicit or implicit tariff of penalties (whether enshrined in sentencing laws and guidelines, penal codes or merely in professional practices), there remains in many jurisdictions a stubborn public (and sometimes professional) perception that the making of a CSM is an act of judicial or executive largesse. When this perception is combined with any public suspicion that the largesse is tied to some non-legal or non-judicial consideration (for example, making cost savings or gaining some political or diplomatic advantage), public cynicism may be the result. This has two main implications for human rights; firstly, in the social and political climate discussed above it generally militates against parsimonious approaches to sentencing and release decisions; secondly, it constructs those subject to CSM as recipients of mercy and thereby *de facto* deprives them of the moral basis for legitimate claims to any entitlements to CSM *and* to fair treatment within CSM.
87. The durability of the perception that the subjects of CSM are recipients of mercy (i.e. as having been 'let off') has vexed probation policymakers and practitioners for decades (e.g. the Morison Report 1964; Casey Report 2008). To some extent, it perhaps reflects the failure of CSM to make significant in-roads into public consciousness. Public opinion research tends to show very little public understanding of the nature and requirements of contemporary CSM, though some support for their aims and methods does exist (Allen and Hough, 2008; Maruna and King, 2008). To address the credibility and legitimacy issues that arise from the 'marketing' problems of CSM, attempts have been in some jurisdictions to create identities for CSM more focused on managing risk and public protection, on delivering punishment in the community, or on recasting them as principally reparative in nature. At the same time, the traditional view of probation as means of re-educating or correcting the corrigible so as to enable their social integration and inclusion has been downplayed (though not necessarily abandoned). In very broad terms, and in some jurisdictions more than others, we might summarise these developments as suggesting a drift away from what Gearty (2006) would perhaps describe as a concern with the claim rights of offenders (linked to a concern with *their* flourishing and well-being) and towards protecting the liberties of potential victims and of communities (see Canton 2008). Paraphrasing Melossi, we might say that in some guises at least, CSM have become less a site where offenders are made fit for enjoying the rights and responsibilities of the social contract (with the intention *retablir dans ses droits*), and more a mechanism for managing the ways in which they are deemed to threaten the liberties of others, and thus the social contract itself.
88. If this sounds somewhat dystopian and over-emphasises developments in Anglophone jurisdictions, it might be more accurate to describe CSM in general as facing a perennial tension over the extent to which they are defined and constructed around the purposes of public protection, penal reductionism and/or rehabilitation/social inclusion. Despite the pressures noted above, in most jurisdictions all three purposes endure in some form or other, and in some

places a more explicit commitment to the pursuit of reparation or mediation has been added where CSM services have sought to engage much more directly with victims⁹. In some jurisdictions, policymakers and practitioners have gone so far as to argue that the three purposes are interdependent, for example casting both the inclusion (or integration) of offenders and the reduction of the use of imprisonment as means by which public protection can and should be enhanced (Robinson and McNeill, 2004; McNeill and Whyte 2007).

89. However, the elevation of public protection as the dominant purpose or meta-narrative in some jurisdictions (Robinson and McNeill, 2004) – even where such discourses are used as a means of re-legitimising welfarist practices – is far from unproblematic. To promise public protection seems to make sense during times when people are insecure about the pace and scale of change in western societies and in this respect the contemporary preoccupation with risks might suggest that the position of CSM can be secured by promising to manage and reduce risks and thus to protect. However, there is a paradox at the heart of protection and there are risks with risk: To promise to protect is to confirm the existence of a threat and thus to legitimise and reinforce fear (Douglas, 1992). Whenever and wherever CSM agencies commit themselves to or worse define themselves through the assessment and management of risks, they expose themselves not to the likelihood of failure, but to its inevitability. Not all risks are predictable and not all harms are preventable. Even being excellent at assessing and managing risks most of the time (assuming that this could be achieved) would not protect probation from occasional, spectacular failures and the political costs that they carry (McCulloch and McNeill, 2007).
90. A further related problem with public protection is that it tends to dichotomise the interests and rights of offenders and the interests and rights of victims and communities in a zero-sum game (McCulloch and McNeill, 2007). It becomes not just a case of protecting ‘us’ from ‘them’, but a case of setting ‘our’ safeties and liberties against ‘theirs’ (see also Canton, 2008). For CSM agencies in some jurisdictions at least this has led to public and political pressure for more secure or incapacitating forms of control; forms of control that serve, at least in the short term, to re-assure. But the traditional mechanisms of protection associated with CSM are to be found in the support of longer-term processes and projects of change and reintegration which provide relatively little security and reassurance in the short-term. Thus although changed ex-offenders who have internalised and committed to the responsibilities of citizenship may offer a better prospect for a safer society in the long term, change programmes and services look somewhat feeble when set against the increasingly threatening offender that communities are taught to fear. In this context, where CSM are cast as just one in a range of means of securing public protection and lack a distinctive moral purpose or identity, they remain in the shadow of the always more incapacitating, always more punishing prison. Even within the community, they have to compete against or seek re-legitimation through the promise of new technologies like remote electronic monitoring which, on some accounts, aspire to create the ‘virtual prison’ in the community (Roberts 2004)¹⁰. In this sense, CSMs are vulnerable to what we might cast not as the penal temptation (*pace* Wacquant) but as the insatiable temptations of incapacitation.
91. It is also necessary to think about who or what CSM aim to protect. Here there is an important difference between protecting potential *future* victims and providing services (including protection and support) for those who have *already been* victimised. In an analogous way, it might be argued that policy-makers and practitioners risk becoming preoccupied with the offender that someone may become rather than with repairing the harms that they have already done, with the person that they are now and with their positive potential. This risk is exacerbated where the promise to protect creates a form of moral liability that rests upon CSM agencies (and on the

⁹ Here we mean ‘real’ victims of extant crimes, as opposed to ‘potential’ victims of future crimes.

¹⁰ Of course as Mike Nellis (2009) has pointed out, electronic monitoring in and of itself does not incapacitate – it merely provides a new means of monitoring and perhaps securing compliance with curfew conditions or home detention.

state) for further offending; the state's liability for previous offending is less obvious and more disputed. The tensions between working with 'real' victims, offenders and communities -- as opposed to working for merely imagined victims, working on offenders as bearers of imagined risks and working towards merely imagined communities -- arguably distorts discourses and practices because focusing too much on the imaginary and the anticipated permits neglect of the present and the real: To pursue public protection as the dominant purpose of CSM therefore is not necessarily to advance victims' or communities' rights -- indeed, it can lead to their neglect.

92. With respect to offenders' and ex-offenders' human rights, the implications of the ascendancy of public protection are perhaps obvious: firstly, their access to CSM (whether instead of custody or as mechanisms for early release) can become conditional on assessments of the risks¹¹ involved in their liberation, irrespective of the sometimes dubious basis of such assessments; secondly, they may not be required to consent to the CSMs to which they find themselves subject, since these measures are not aimed at their interests; thirdly, CSMs may come to be loaded with more onerous and intrusive conditions, in the public interest; fourthly, combinations of the involuntary nature of supervision and its more onerous conditions may increase the likelihood of technical violations¹² of CSM; and fifthly, violation of CSM may lead to greater penalties than would have been imposed at first instance. In these conditions, CSM can become a driver of incarceration rates rather than a brake upon them. For those caught up in such systems and practices, questions of the legitimacy of and procedural justice in the administration of CSM may be no less pressing than they are for those in custody.
93. Even leaving aside the pressures and problems generated by the dominance of public protection, the punitive effects of CSM have rarely been recognised or discussed, perhaps particularly because they have until comparatively recently been cast as essentially benign, inclusive, welfarist measures with re-integrative intent. But of course, as the history of the field of juvenile justice so clearly illustrates, the pursuit of welfare can often result in consequences that are experienced as being highly punishing by those on the receiving end. Perhaps because of the more obvious nature of the pains of confinement referred to above, there has been very little research, policy or practice attention to the pains of CSM -- and until recently very little jurisprudence around related human rights claims¹³. One recent exploratory study in Romania, has identified eight such deprivations or frustrations including deprivation of autonomy, the pains of reorganizing the daily routine around the sanction, deprivation of private family life, deprivation of time, financial costs, stigmatization effects, the forced return to the offence (in the context of interventions), and living under the threat of breach and further penalties (Durnescu, in preparation, see also Applegate et al., 2009). In some contexts where CSM involve unpaid work, we could add the pains of labour. As Durnescu notes, it is important to examine which of these pains is an *intended* part of the sanction, which is *incidental* to it, and which is *obiter* (i.e. falling on others, such as family members). With respect to both incidental and obiter effects of punishment, the ECHR establishes a positive obligation on the state to minimize and/or compensate any unlawful punishment, or any punishment beyond the law (articles 5, 6 and 7). Of course, the social and political contexts to which we have referred throughout -- and their link to the ascendancy of public protection concerns -- create further pressures to neglect rather than attend to the proper boundaries and limits of punishment.
94. Yet despite the adverse pressures upon CSM created by the discontents of late-modernity, there are at least three reasons to retain a degree of optimism about the future of CSM and about their enduring potential as a means of advancing human rights agendas. Firstly, and most obviously,

¹¹ This is not the place for a discussion of the accuracy of risk assessment, but it should be noted that professional assessments of risk are not immune to the wider social and political pressures discussed above.

¹² By technical violations, we mean breaches of the conditions of supervision as opposed to the commission of further offences.

¹³ Paine and Gainey (1998) have explored the pains of electronic monitoring -- see also Nellis (2009).

in Europe at least, there is at last some evidence of the emergence of a significant strand of scholarship and of increasing political attention to the development of a human rights agenda within the CSM field (for an overview, see Morgenstern, 2009).

95. Secondly, in recent years a body of criminological evidence about how and why people desist from offending has expanded and emerged as an influence on penal policy and practice, particularly on CSM policy and practice (e.g. Maruna 2001, Farrall 2002, McNeill, 2006). It is perhaps not accidental that this body of work developed within precisely those Anglophone jurisdictions where CSM were being reconfigured around protective and/or punitive impulses and agendas. Desistance research – particularly where it concerns the impact of penal interventions on criminal careers – has to some extent enabled scholars and reformers to begin to make an empirical case *against* the utility of imprisonment as a means of reducing reoffending, and in particular against its excessive use. But it has also suggested the need for CSM to be configured in ways that support desistance. The empirical evidence suggests that this requires a reinstatement of social inclusion/integration as a priority, and the use of practice methods characterised by both humanity and legitimacy. In a sense, desistance research seems to make an empirical necessity out of morally virtuous forms of supervision that not only respect human rights but that recognise and seek to support offender's rights claims against the state (McNeill, 2006).
96. Thirdly, if desistance research is about enabling offenders to 'make good' (Maruna, 2001), then the conceptual, empirical and moral connections to developments around reparation and restorative justice should not be difficult to develop (McNeill, forthcoming). In very general terms, reparative CSM appear to fare reasonably well in terms of public support, though recent research suggests the need to engage more directly and more directly with the emotive appeal of the concept of and possibilities for 'redemption' (Maruna and King, 2008).
97. In this regard, there are philosophical and conceptual resources available with which to refashion CSMs not as merciful *alternatives to punishment*, but as deserved *alternative punishments*. The penal philosopher Antony Duff (2001) has argued convincingly that we can and should distinguish between 'constructive punishment' and 'merely punitive punishment'. Constructive punishment can and does involve the intentional infliction of pains, but only in so far as this is an inevitable (and intended) consequence of 'bringing offenders to face up to the effects and implications of their crimes, to rehabilitate them and to secure... reparation and reconciliation' (Duff, 2003: 181). This seems very close in some respects to the ideas of challenging and confronting offending which have been widely accepted in CSM agencies in recent years, partly in response to political pressures to get tough but also, more positively, in response to the legitimate concerns of crime victims that their experiences should be taken more seriously. But equally critically, by defining CSM as constructive punishments, it exposes them both in their imposition *and in their administration* more clearly to the limits of proportionality and the requirements of legitimacy.
98. But Duff's work also helps us with a second problem, since he recognises that where social injustice is implicated in the genesis of offending, the infliction of punishment (even constructive punishment) by the state is rendered morally problematic, because the state is itself complicit in the offending through having failed in its prior duties to the 'offender'. For this reason, Duff suggests CSM workers should play a pivotal role in mediating between the offender and the wider polity, holding each one to account on behalf of the other.
99. It may be therefore that Duff's work provides some of the conceptual resources with which to populate the CSMs conceptually and constructively. His notion of constructive punishment and his insistence on the links between social justice and criminal justice might help to buttress CSMs against drifting in more punitive and protective directions. Gordon Bazemore's (1998) work on 'earned redemption' examines more directly the tensions and synergies between reform

and reparation, and the broader movements around 'relational justice' (Burnside and Baker, 2004) and restorative justice (Johnstone and Van Ness, 2007) provide possible normative frameworks within which to further debate and develop these tensions and synergies.

100. Clearly the closer examination of these synergies and tensions that now seems necessary is beyond the scope of this paper. But in terms of the practical applications for CSM agencies, these ideas and developments evoke Martin Davies's (1981) notion of probation as a mediating institution. We can understand this in two ways. Firstly, CSM agencies mediate between the sometimes conflicting purposes of punishment – between retribution (but not of the merely punitive kind), reparation and rehabilitation. But equally they can mediate between the stakeholders in justice -- between courts, communities, victims and offenders, much in the manner that Duff (2003) suggests. In both senses, such a mediating role appears to be crucial for the future of CSM; more specifically, the development of this role seems crucial to unlocking their potential as modes of sanctioning and punishment that not only demand something of the offender but also recognise that human rights obligations flow in the other direction too.

CONCLUSION: INCARCERATION, HUMAN RIGHTS AND THE STRUGGLE FOR LEGITIMACY

101. There is more – a great deal more – at stake in grasping the relations between incarceration, as a mode of social control, other kinds of sanctions, and the implications of each for human rights policy than monitoring prison authorities for their convention compliance, important as this is. The vagaries of the modern history of imprisonment, not to mention the striking disparities in its uses today, make clear that penal practices always focus questions of legitimacy in very special and particular ways by reason of their intense concentration of the state's resources of compulsion and force, and the arguments of justice and necessity mobilized to warrant the deprivations and censures thus imposed. If it is in some sense evident, even self-evident, that the scale and character of the penal realm is a privileged indicator of the limits of the citizen's (or subject's) claims on recognition from or consideration by political authorities, then the ease with which batches and swathes of populations in some countries today can be incarcerated, and under what conditions, suggests a thinning of mutuality, sometimes to a very tenuous point indeed. In this sense it is important (because there are structural reasons why what may seem 'obvious' is routinely overlooked) to continue to try to drag the moral challenges and ambiguities of the prison as an institution out of obscurity and into the spotlight, where possible. At the same time the very domination of the prison in the modern penal social imaginary continues to inhibit the development either of wider public understanding of, or much sympathy for, sanctions and measures *other than* imprisonment or of much in the way of coherent theory or jurisprudence around these. The needs to theorize and describe the position of the prison in political culture, and to displace it from its centrality in our conceptions of justice, remedy and redress, are each as urgent, and as hard to reconcile with one another, as ever.

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